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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 497

THOGER GRONBERG JUNGERSEN,
Petitioner,

vs.

OSTBY AND BARTON COMPANY and AMERICAN ASSOCIATES, INC.,
Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND PETITION FOR REHEARING

WILLIAM H. DAVIS,
KARL W. FLOCKS,
Attorneys for Petitioner.

New York, N. Y.,
April 21, 1948.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 467

THOGER GRONBERG JUNGERSEN,

Petitioner,

vs.

OSTBY AND BARTON COMPANY and AMERICAN ASSOCIATES, INC.,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

Petitioner presents this his motion for leave to file out of time a petition for rehearing of his petition for writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit and respectfully shows:

1. On December 4, 1947, petitioner and respondents filed petitions for writs of certiorari, in Numbers 467 and 468, to review the judgment of the Third Circuit Court of Appeals in the case of *Ostby and Barton Co. et al.* v. *Jungersen* (163 F. 2d 312), with respect to the Jungersen patent No. 2,118,468. In number 467, petitioner sought review of the part of the judgment holding claims 5 and 6 invalid, and in number 468 respondents sought review of the part of the judgment holding claims 1-4 inclusive valid. Both

petitions were denied on January 12, 1948. Motions by both parties to extend the time allowed for filing petitions for rehearing were denied on February 2, 1948.

2. On March 10, 1948, the Circuit Court of Appeals for the Second Circuit, Judge Learned Hand dissenting, affirmed a judgment of the District Court for the Southern District of New York holding all six claims of the Jungersen patent No. 2,118,468 invalid, thus creating a conflict of decisions between circuit courts of appeals with respect to the validity of claims 1-4 inclusive of the patent. The case is *Jungersen* v. *Baden et al.*, and the opinions of the courts are reported in 69 F. Supp. 922 and F. 2d , 76 U. S. P. Q. 488.

3. Respondents have filed in this court a motion for leave to file out of time a petition for rehearing asking a reconsideration of their petition for writ of certiorari in number 468 on the ground of the newly created conflict between different circuit courts of appeals as to the validity of claims 1-4 inclusive of the patent. We agree that such a conflict has been created and do not oppose respondents' motion. Indeed we seek to have that same conflict resolved by a petition, shortly to be filed, for writ of certiorari to the Second Circuit Court of Appeals seeking review of that court's decision holding all the claims invalid.

4. The purpose of the present motion for leave to file the annexed petition for rehearing out of time is to bring up the entire case on the patent for decision, including the decision holding claims 5 and 6 invalid. The grounds for the granting of the rehearing, based on intervening circumstances of substantial or controlling effect or other substantial grounds not previously presented, are set forth in the following petition for rehearing as required by Rule 33 of this Court.

5. The petition for writ of certiorari in number 467 which is sought to be reheard was filed at the present term of this court.

WHEREFORE, petitioner prays that this motion to permit petitioner to file the accompanying petition for rehearing of said petition for a writ of certiorari be granted.

Respectfully submitted,

WILLIAM H. DAVIS,
KARL W. FLOCKS,
Attorneys for Petitioner.

New York, N. Y.,
April 21, 1948.

Certificate of Counsel

I hereby certify that the foregoing motion and the accompanying petition for rehearing are presented in good faith and not for delay, and that the petition for rehearing is confined to the grounds specified in Rule 33, subdivision 2, of the rules of this court.

WILLIAM H. DAVIS,
Attorney for Petitioner.

PETITION FOR REHEARING

Petitioner presents this his petition for rehearing of his petition for writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit in the above-identified case.

The petition for writ of certiorari seeks review of that part of the judgment of the Third Circuit Court of Appeals holding claims 5 and 6 of the Jungersen patent invalid.

Newly Arising or Additional Ground for the Grant of the Petition for Writ of Certiorari

The conflict as to the validity of claims 1-4 inclusive created by the decision of the Second Circuit Court of Appeals in *Jungersen* v. *Baden et al.*, F. 2d , 76 U. S. P. Q. 488, makes it probable that this Court will review the validity and scope of the Jungersen patent with respect to those claims. It is desirable that the validity and scope of the other claims of the patent, namely, claims 5 and 6, be passed on at the same time by this Court for the following reasons:

1. The courts of the Second Circuit, in holding all of the claims of the patent invalid, did not predicate their decision on any difference in substance between the method of claims 1-4 inclusive and the method of claim 5. Claim 6 is for the product of the method of claim 5 and stands or falls with that claim.

2. Claim 5, properly interpreted, can only cover the method disclosed in the patent and its equivalents. Consideration of the validity of claims 1-4 inclusive will necessarily involve a consideration of what other methods of forming the primary mold and what other forces for introducing the wax into the primary molds are equivalent

to those disclosed in the patent. The scope of inquiry will not therefore be enlarged by the inclusion of claims 5 and 6.

3. A decision of this court upholding the validity of claims 1-4 inclusive without a consideration of claims 5 and 6 would leave the status of claims 5 and 6 and the scope of the patent in uncertainty in view of the decision of the District Court of Maryland upholding all six claims in *Jungersen* v. *Jenkins et al.*, D. C., D. Md. (30 F. Supp. 615), and the dissenting opinion of Judge Learned Hand upholding the validity of the method of the patent, without distinction between the claims, as having "every hall-mark of a valid patent".

4. A consideration of the entire case is desirable in order to provide a definite and final adjudication of the validity and scope of a patent of importance in jewelry manufacture and in widespread use.

WHEREFORE, petitioner prays that this petition for rehearing of the petition for writ of certiorari be granted and the entire cause reviewed and the judgment of the Circuit Court of Appeals for the Third Circuit with respect to claims 5 and 6 be reversed.

Respectfully submitted,

WILLIAM H. DAVIS,
KARL W. FLOCKS,
Attorneys for Petitioner.

New York, N. Y.,
April 21, 1948.